PECD BHD & ANOR A

v.

AMTRUSTEE BHD & OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA B
ZALEHA ZAHARI JCA
KN SEGARA JCA
KANG HWEE GEE J
[CIVIL APPEAL NOS: W-02(IM)-385-2009,
W-02(IM)-386-2009 & W-02(IM)-387-2009] C
15 SEPTEMBER 2009

COMPANY LAW: *Arrangement, scheme of - Ex parte order for leave to convene creditors' meeting and to restrain all legal proceedings - Failure to disclose similar earlier application for order that had been dismissed - Non bona fide of scheme and workability - Whether appeal against setting aside allowed - Companies Act 1965, s. 176* D

CIVIL PROCEDURE: *Judgments and orders - Ex parte order - Setting aside - Failure to make full and frank disclosure - Whether appeal against setting aside allowed* E

COMPANY LAW: *Liquidation - Antecedent debt with noteholders - Whether monies earmarked to settle debt with noteholders could be utilised together with claims by other creditors - Whether company could renege on undertaking given - Interpretation and applicability of Barclays Bank Ltd v. Quitclose - Whether monies held on a Quitclose trust* F

There were three appeals herein that were heard jointly. The respondents in the appeals were three interveners whose application to set aside an *ex parte* order was allowed by the High G Court. The background facts that led to the appeals were as follows. The 1st appellant in the appeals had a subsidiary company called PECD Jaya Holdings Sdn Bhd ('PECD Jaya'). PECD Jaya executed a Murabahah Notes Issuance Facility Agreement with investors ('Noteholders') to issue Islamic Notes ('Notes') up to H the value of RM200 million. AmTrustee Berhad ('AmTrustee'), one of the respondents herein, was appointed trustee to manage the Noteholders' investment and to whom all repayments of the Notes were to be paid. PECD Jaya defaulted on the repayments and the 1st appellant as the holding company stepped in to obtain I indulgence from AmTrustee in consideration of which it undertook

to pay AmTrustee the sum of RM30 million in part payment. The money was to be raised by a "rights issue" based on the 1st appellant's new shares and warrants and a letter of undertaking was given to that effect. However, after successful completion of the rights issue exercise, the 1st appellant reneged on the given undertaking on the ground that it was insolvent. Both appellants then made a joint *ex parte* application under s. 176(1) of the Companies Act 1965 ('the Act') to convene meetings of the appellants' creditors within 90 days from the date of the order and an injunction under s. 176(10) of the same restraining all legal proceedings against the appellants for a period of 90 days ('RO'). The *ex parte* application was not allowed by the High Court. On appeal, the Court of Appeal granted the application except that the RO was granted for 60 days instead of 90 days. The appellants then applied for an extension for another 30 days but that was rejected by the High Court and the Court of Appeal. Subsequently, the appellants applied *ex parte* for the same orders again notwithstanding the fact that the earlier application had expired and its extension disallowed by the High Court and Court of Appeal. The application was heard by a different judge of the same court who granted the *ex parte* order. The respondents then applied to intervene to set aside the *ex parte* order and that was allowed. The learned judge found that there was non-disclosure of material facts as the appellants failed to disclose their earlier similar application which had been dismissed by the High Court. Secondly, that the proposed scheme of arrangement ('SA') was lacking *bona fide* and unworkable. Further, that the sum of RM30 million belonged to the Noteholders under a Quitclose trust based on the case of *Barclays Bank Ltd v. Quitclose Investments Ltd* ('*Quitclose*'). Hence, the appeals.

Held (dismissing the appeals) (unanimous decision)
Per Zaleha Zahari JCA:

(1) What transpired in the first application at the High Court and the decision of the Court of Appeal in respect of the appeal therefrom were certainly material facts which should have been disclosed by the appellants in applying for the *ex parte* order in the second application. The 1st appellant should have also disclosed that the RM30 million of the RM40 million came from the proceeds of the rights issue raised for the specific purpose for payment to AmTrustee for partial redemption of the Notes, and that AmTrustee had claimed such monies. The

appellants should have also disclosed their letter seeking the Securities Commission's approval for the rights issue exercise and the said commission's approval given for the rights issue exercise and its terms. The failure to make such full and frank disclosure rendered the *ex parte* order rightly set aside. The appeals could be dismissed on that ground alone. (paras 27 & 28)

(2) The principle in the *Quitclose* line of cases is that equity fastens on the conscience of the person who receives monies for a specific purpose and not for the recipient's own purpose so that such a person will not be permitted to treat the property as his own or to use it for other than for the stated purpose. The High Court judge was right in finding that a contractual promise to apply earmarked monies for a specific purpose created an equitable trust in those monies by way of trust based on the proposition that it was unconscionable for a man to give an undertaking and obtain money on terms as to its application and then to totally disregard the terms on which the monies were to be applied. The High Court judge was therefore right in finding that the sum of RM30 million out of the rights issue was held by the 1st appellant on a *Quitclose* trust. (para 38)

(3) The scheme proposed herein was similar to that of the 1st scheme in the 1st application that was voted out by the creditors. The appellants had no funds other than the rights issue monies. It was against public policy to approve a scheme by an insolvent company. (para 39)

(4) The Capital Market and Services Act ('CMSA') came into force two days after the Securities Commission ('SC') approved the 1st appellant's application for the rights issue exercise. The rights issue exercise was implemented after the CMSA came into force on 28 September 2007. The relevant provisions of CMSA and its predecessor, the Securities Industry Act 1983, governing the issues of securities by a public listed company were identical. The 1st appellant, in any event, was estopped from arguing it could use the monies as it wished because the 1st appellant attempted but failed to secure the SC's permission for a change in the utilisation of the RM30 million. (para 42)

(5) The appellants clearly failed to act *bona fide* in the 2nd application and had abused the provisions of s. 176 of the Companies Act 1965, and also the court process. By obtaining the 2nd RO on an *ex parte* basis, the appellants restrained AmTrustee from pursuing its rights under the 1st appellant's undertaking. If the appellants then proceeded to the creditors' meeting to vote on the scheme, there was a possibility that the other creditors might out-vote AmTrustee as they would be paid from the monies solely due to AmTrustee. (para 43)

Per Kang Hwee Gee J (KN Segara JCA concurring):

(1) The appellants omitted to state in their supporting affidavits the following facts: (1) that a previous application of a similar nature had been made to the same court before the previous judge and had been dismissed; (2) that the order was only allowed on appeal to the Court of Appeal which granted an RO of 60 days; (3) that subsequently an application for extension of the RO was disallowed by the High Court and that was confirmed on appeal to the Court of Appeal; and (4) that the proposed SA under the *ex parte* order had earlier been rejected by the creditors at the meeting on 1 August 2008. (para 66)

(2) It was well established that an affidavit supporting *an ex parte* application for a relief must make full and frank disclosure in order to enable the court to properly decide whether there were grounds to grant the order on an *ex parte* basis. The appellants' contention that there might not be a need to disclose the necessary facts as they were making a fresh application was unacceptable. On the contrary the fact that it was a new application based on the same SA made it all the more necessary that all facts relating to the previous application be disclosed for whatever reason it might have been dismissed. Without disclosing the antecedent of the new application, the judge would not be able to undertake an objective assessment whether to grant the order sought on an *ex parte* basis. The appellants' omission to provide the necessary antecedents of the application was an abuse of the court process that might necessitate citing the 1st appellant's CEO (who deposed the affidavit supporting the application) for contempt. (paras 67, 68 & 69)

(3) It was common ground that out of the RM40 million that the appellants proposed to use in the SA with the creditors, RM30 million constituted sums from the rights issue which was raised by the 1st appellant specifically for the purpose of repaying the Murabahah Noteholders as approved by the SC and as declared in the abridged prospectus disseminated to its shareholders. Therefore, the learned judge rightly found that it would be against public policy to sanction the SA, for to do so would tantamount to condoning as against AmTrustee, a breach of undertaking and as against the subscribers who expected the proceeds would be used to pay the Noteholders, a probable breach of trust and a breach of s. 32 of the Securities Commission Act 1993 (then in force) respecting the non-compliance of the terms of the rights issue as approved by the SC. (paras 70 & 71)

(4) The learned judge's finding that the RM30 million belonged to AmTrustee as beneficiary of a *Quitclose* trust was incorrect. The *Quitclose* case was basically decided on the rational that when money was advanced, the lender acquired an equitable right to see that it was applied for the primary designated purpose. It was true that the sum was raised by the 1 st appellant from the rights issue and that it was intended to be used for the specific purpose of paying the Noteholders. But it was clear that the Noteholders were not beneficiaries of the sum under a trust less so a *Quitclose* trust. Unlike in the *Quitclose* trust, the Noteholders were not the provider of the fund. The subscribers paid the money to buy the rights issue shares from the 1st appellant as opposed to paying the Noteholders the sum due from the 1st or the 2nd appellant under the Notes. (paras 72, 73, 74 & 75)

(5) The Noteholders' recourse was an action against PECD Jaya (the issuer of the Notes) or against the 1st appellant (the holding company of PECD Jaya) to enforce its undertaking to repay the Notes. The Noteholders stand in the same position as any unsecured creditors in respect of the debt owed on the Notes in the event that the 1st appellant was wound up before it settled the Notes. (para 76)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Terdapat tiga rayuan di sini yang didengar serentak. Responden-responden dalam rayuan-rayuan adalah tiga pencelah yang telah berjaya mengenepikan suatu perintah *ex parte* di Mahkamah Tinggi. Latarbelakang fakta yang membawa kepada rayuan-rayuan adalah seperti berikut. Perayu pertama dalam rayuan-rayuan memiliki sebuah syarikat yang bernama PECD Jaya Holdings Sdn Bhd ('PECD Jaya'). PECD Jaya telah memeterai satu Perjanjian Kemudahan Pengeluaran Nota-Nota Murahabah dengan pelabur-pelabur ('pemegangNota') bagi mengeluarkan Nota-Nota Islam ('Nota-Nota') sehingga ke nilai RM200 juta. AmTrustee Berhad ('AmTrustee'), salah satu dari responden-responden di sini, telah dilantik sebagai pemegang amanah bagi menguruskan pelaburan pemegang Nota dan semua pembayaran balik Nota-Nota hendaklah dibuat kepadanya. PECD Jaya memungkiri pembayaran balik dan perayu pertama, selaku syarikat induknya, telah campurtangan bagi memohon ehsan AmTrustee dan sebagai balasannya telah bersetuju untuk membayar AmTrustee sejumlah RM30 juta sebagai bayaran sebahagian. Wang tersebut diperolehi melalui "terbitan modal" berdasarkan waran dan saham-saham baru perayu pertama dan satu surat akujanji bagi tujuan tersebut telah dikeluarkan. Bagaimanapun, setelah terbitan modal berjaya dilaksanakan, perayu pertama memungkiri janjinya atas alasan ia telah insolven. Kedua-dua perayu kemudian bersama-sama membuat permohonan *ex parte* di bawah s. 176(1) Akta Syarikat 1965 ('Akta') bagi mengadakan mesyuarat pemiutang-pemiutang perayu pertama dalam tempoh 90 hari dari tarikh perintah serta untuk satu perintah injunksi di bawah s. 176(10) Akta menghalang semua prosiding undang-undang terhadap perayu-perayu dalam tempoh 90 hari ('RO'). Permohonan *ex parte* ini tidak dibenarkan oleh Mahkamah Tinggi. Di rayuan, Mahkamah Rayuan telah membenarkan permohonan, kecuali bahawa RO dibenarkan setakat 60 hari dan bukannya 90 hari. Perayu-perayu kemudian memohon lanjutan masa untuk tempoh 30 hari lagi, namun permohonan tersebut ditolak oleh Mahkamah Tinggi serta Mahkamah Rayuan. Berikutnya, perayu-perayu sekali lagi memohon secara *ex parte* untuk perintah-perintah yang sama walaupun permohonan mereka sebelumnya telah luput dan perlanjutan masa baginya telah tidak dibenarkan oleh Mahkamah Tinggi dan Mahkamah Rayuan. Permohonan didengar oleh seorang hakim Mahkamah Tinggi lain yang sekaligus membenarkan perintah *ex parte*. Berbangkit dari itu,

responden-responden telah memohon untuk mencelah bagi mengenepikan perintah *ex parte* dan permohonan dibenarkan. Yang arif hakim mendapati bahawa telah berlaku ketidakdedahan fakta material disebabkan perayu-perayu gagal dalam permohonan terdahulu mereka yang sama yang ditolak oleh Mahkamah Tinggi. Keduanya, bahawa skim penyusunan semula yang dicadangkan ('SA') adalah tidak *bona fide* dan sukar dilaksanakan. Selanjutnya, bahawa jumlah RM30 juta adalah dimiliki oleh pemegangNota di bawah amanah *Quitclose* berdasarkan kepada kes *Barclays Bank Ltd v. Quitclose Investments Ltd* ('*Quitclose*'). Oleh itu berbangkitlah rayuan-rayuan di sini.

Diputuskan (menolak rayuan)(keputusan sebulat suara)
Oleh Zaleha Zahari HMR:

(1) Apa yang berlaku semasa permohonan pertama di Mahkamah Tinggi serta keputusan Mahkamah Rayuan berhubung dengan rayuan terhadapnya adalah merupakan fakta material yang sepatutnya didedahkan oleh perayu-perayu apabila memohon untuk perintah *ex parte* dalam permohonan kedua. Perayu pertama juga harus mendedahkan bahawa RM30 juta dari jumlah RM40 juta tersebut adalah datangnya dari hasil terbitan modal yang dilaksanakan semata-mata untuk membayar AmTrustee iaitu sebagai penebusan sebahagian Nota-Nota, dan bahawa AmTrustee telah pun menuntut wang tersebut. Selanjutnya perayu-perayu juga patut mendedahkan mengenai surat mereka yang memohon kelulusan Suruhanjaya Sekuriti bagi melaksanakan terbitan modal dan kebenaran yang diberikan oleh suruhanjaya tersebut beserta dengan terma-termanya. Kegagalan membuat pendedahan menyeluruh sedemikian menyebabkan perintah *ex parte* wajar diketepikan. Atas alasan ini sahaja rayuan sudah boleh ditolak.

(2) Prinsip dalam kes-kes yang sealiran dengan *Quitclose* adalah bahawa ekuiti terikat dengan hatibudi seseorang yang menerima wang untuk maksud-maksud tertentu dan bukan untuk maksud peribadi penerima tersebut, berakibat seseorang itu tidak dibenarkan menganggap wang tersebut sebagai wangnya sendiri atau menggunakannya untuk tujuan selain dari yang dinyatakan. Hakim Mahkamah Tinggi betul dalam mendapati bahawa suatu janji kontraktual bagi menggunakan wang yang bertanda untuk suatu tujuan tertentu telah mewujudkan suatu amanah berekuiti atas wang tersebut

melalui amanah yang berasaskan kepada proposisi bahawa ianya adalah tidak berhatibudi bagi seseorang untuk memberi suatu akujanji dan sekaligus memperoleh wang yang tertakluk kepada syarat-syaratnya untuk kemudiannya tidak mengendahkan langsung syarat-syarat yang berdasarkan mana wang tersebut telah diberi. Hakim Mahkamah tinggi dengan itu betul dalam mendapati bahawa wang sejumlah RM30 juta hasil dari terbitan modal dipegang oleh perayu pertama atas amanah *Quitclose*.

(3) Skim yang dicadangkan di sini sama dengan skim pertama di dalam permohonan pertama yang ditolak oleh pemiutang-pemiutang. Perayu-perayu tidak mempunyai dana selain dari wang dari terbitan modal. Adalah bertentangan dengan polisi awam untuk membenarkan suatu skim oleh sebuah syarikat yang insolven.

(4) Akta Pasaran Modal dan Perkhidmatan ('CMSA') mula berkuatkuasa dua hari selepas Suruhanjaya Sekuriti ('SC') meluluskan permohonan perayu pertama untuk pelaksanaan terbitan modal. Pelaksanaan terbitan modal dibuat selepas CMSA mula berkuatkuasa pada 28 September 2007. Peruntukan-peruntukan relevan CMSA dan Akta mendahuluinya, Akta Perindustrian Sekuriti 1983, yang mengawal selia penerbitan-penerbitan modal oleh syarikat-syarikat tersenarai, adalah serupa. Walau apapun, perayu pertama dihalang dari menghujah bahawa ia boleh menggunakan wang sesuka hatinya kerana perayu pertama cuba tetapi gagal mendapatkan kelulusan SC bagi menukar cara penggunaan jumlah RM30 juta tersebut.

(5) Perayu-perayu jelas tidak bertindak secara *bona fide* dalam permohonan kedua dan telah menyalahguna peruntukan-peruntukan s. 176 Akta Syarikat 1965 dan proses mahkamah. Dengan memperoleh RO kedua secara *ex parte*, perayu-perayu telah menghalang AmTrustee dari menggunakan hak-hak mereka di bawah akujanji perayu-perayu. Jika perayu-perayu kemudiannya menghadiri mesyuarat pemiutang-pemiutang dan membuang undi berkaitan dengan skim, berkemungkinan pemiutang-pemiutang lain akan mengundi keluar AmTrustee, disebabkan mereka akan dibayar dari wang yang jelas hanya untuk AmTrustee.

Oleh Kang Hwee Gee H (KN Segara HMR menyetujui)

(1) Perayu-perayu gagal menyatakan dalam affidavit-afidavit sokongan mereka fakta-fakta berikut: (1) bahawa suatu permohonan terdahulu yang serupa telah dibuat ke mahkamah yang sama di hadapan hakim sebelumnya di mana permohonan telah ditolak; (2) bahawa perintah hanya dibenarkan atas rayuan ke Mahkamah Rayuan yang membenarkan RO untuk selama 60 hari; (3) bahawa berikutnya permohonan untuk perlanjutan RO telah ditolak oleh Mahkamah Tinggi, penolakan mana, di rayuan, telah disahkan oleh Mahkamah Rayuan; dan (4) bahawa SA yang dicadangkan di bawah perintah *ex parte* telah sebelum itu ditolak oleh pemiutang-pemiutang di mesyuaratnya pada 1 Ogos 2008.

(2) Sudah menjadi satu prinsip mantap bahawa suatu afidavit menyokong suatu permohonan *ex parte* untuk relif hendaklah membuat pendedahan yang jujur dan menyeluruh bagi membolehkan mahkamah memutuskan dengan wajarnya sama ada wujud alasan-alasan bagi membenarkan perintah secara *ex parte*. Hujah perayu-perayu bahawa mungkin tiada keperluan untuk membuat pendedahan fakta-fakta berkenaan disebabkan permohonan adalah satu permohonan baru adalah tidak boleh diterima. Malah, fakta bahawa ia merupakan satu permohonan baru tetapi berdasarkan SA yang sama membuatkannya lebih penting bahawa semua fakta berkaitan permohonan terdahulu harus didedahkan walau apapun alasan ianya ditolak. Tanpa mendedahkan fakta terdahulu permohonan baru itu, hakim tidak mungkin dapat membuat penilaian yang objektif sama ada untuk membenarkan perintah yang dipohon secara *ex parte*. Kegagalan perayu-perayu untuk mendedahkan faka-fakta terdahulu permohonan yang perlu adalah satu salahguna proses mahkamah yang mungkin membawa kepada pendakwaan CEO perayu (yang mendeposkan affidavit menyokong permohonan) kerana menghina.

(3) Adalah diakui bahawa dari jumlah RM40 juta yang dicadang untuk digunakan oleh perayu-perayu ekoran SA dengan pemiutang-pemiutang, RM30 juta adalah datangnya dari terbitan modal yang diperolehi oleh perayu pertama khusus untuk membayar balik pemegangNota Murabahah seperti yang diluluskan oleh SC dan seperti yang diisytiharkan di dalam ringkasan prospektus yang disebarkan kepada pemegang-pemegang saham. Oleh itu, yang arif hakim dengan betulnya

mendapati bahawa ianya adalah bertentangan dengan polisi awam untuk mesanksikan SA, kerana, dengan berbuat demikian bererti memaafkan perbuatan memungkiri akujanji AmTrustee, dan berhubung dengan penyumbang-penyumbang yang mengharapkan supaya dana digunakan untuk membayar pemegangNota, turut memaafkan kemungkinan suatu pecah amanah oleh mereka serta kesalahan di bawah s. 32 Akta Suruhanjaya Sekuriti 1993 (yang berkuatkuasa ketika itu), iaitu yang menyentuhi ketidakpatuhan terma-terma terbitan modal seperti yang diluluskan oleh SC.

(4) Dapatan yang arif hakim bahawa RM30 juta adalah milik AmTrustee selaku benefisiari suatu amanah *Quitclose* adalah salah. Kes *Quitclose* pada dasarnya diputuskan atas rasional bahawa bilamana wang dipinjamkan, pemberi pinjam memperoleh satu hak berekuiti untuk melihat bahawa ia secara pentingnya digunakan untuk tujuan wang tersebut dipinjamkan. Adalah betul bahawa wang tersebut telah perolehi oleh perayu pertama dari terbitan modal dan bahawa ianya bertujuan khusus untuk membayar balik pemegangNota. Namun adalah jelas bahawa pemegangNota bukanlah benefisiari kepada jumlah tersebut di bawah mana-mana amanah sementelah suatu amanah *Quitclose*. Tidak seperti di dalam amanah *Quitclose*, pemegangNota adalah bukan pemberi dana. Penyumbang-penyumbang membayar wang bagi membeli terbitan modal dari perayu pertama dan bukannya untuk membayar kepada pemegangNota jumlah yang terhutang oleh perayu pertama atau kedua di bawa Nota-Nota.

(5) Jalan yang terbuka bagi pemegangNota adalah tindakan terhadap PECD Jaya (pengeluar Nota-Nota) atau terhadap perayu pertama (syarikat induk PECD Jaya) bagi melaksanakan akujanjinya untuk membayar balik Nota-Nota. PemegangNota berada dalam kedudukan yang sama seperti pemiutang-pemiutang tak bercagar berhubung dengan hutang yang terhutang atas Nota-Nota sekiranya perayu pertama digulung sebelum ia menjelaskan Nota-Nota.

Case(s) referred to:

Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567 ***(refd)***

Castle Inn Sdn Bhd v. Bumiputra-Commerce Bank Bhd [2009] 2 CLJ 445 CA ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2004] 1 CLJ 239 CA ***(refd)***

Reg v. Special Commissioners of Income Tax District of Kensingon, ex parte Princess Edmond De Polignac [1917] 1 KB 486 ***(refd)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 176(1), (10A), (10)(c), (d)
Securities Commission Act 1993, s. 32

(Civil Appeal No: W-02(IM)-385-2009)
For the appellants - Dato' Loh Siew Cheang (Kelvin Seet Wan Nam & Abdullah Abdul Rahman with him); M/s Cheang & Ariff
For the respondent - Yoong Sin Min (Lau Kee Sern & Lee Weng Shinh with him); M/s Shook Lin & Bok

(Civil Appeal No: W-02(IM)-386-2009)
For the appellants - Dato' Loh Siew Cheang (Kelvin Seet Wan Nam & Abdullah Abdul Rahman with him); M/s Cheang & Ariff
For the respondent - M Menon; M/s Jaafar & Menon

(Civil Appeal No: W-02(IM)-387-2009)
For the appellants - Dato' Loh Siew Cheang (Kelvin Seet Wan Nam & Abdullah Abdul Rahman with him); M/s Cheang & Ariff
For the respondent - Shanti Supramaniam; M/s Belden

[Appeal from High Court, Kuala Lumpur; Originating Summons No: D2-24-336-2008]

Reported by Usha Thiagarajah

JUDGMENT

Zaleha Zahari JCA:

[1] The High Court Judge by order dated 27 February 2009 allowed the application of the three interveners (the respondents in these appeals) to set aside an *ex parte* order dated 18 August 2008 obtained by the applicants (the appellants in all three appeals). The three appeals were heard jointly and were unanimously dismissed with costs. My reasons in dismissing them are as follows.

[2] The common issues for determination in these appeals are: Whether there were material non-disclosure on the part of the appellants in obtaining the *ex parte* order dated 18 August 2008? In respect of the appeal against the respondent in Appeal No. W-02(IM)-385-2009, what is the consequence in law of an

undertaking given by the 1st appellant to them as trustee of certain noteholders? Whether the proposed scheme of the appellants is *mala fide*?

The Facts

[3] The antecedent facts leading to the filing of these three appeals are these.

[4] On 14 October 2004 Murabahah Notes Issuance Facility Agreement (MUNIF/MMTN) was executed by PECD Jaya Holdings Sdn. Bhd. (formerly known as Peremba Jaya Holding Sdn Bhd., "the issuer") to issue certain notes ("the notes") of up to RM200 million to various noteholders (investors). AmTrustee Berhad (the respondent in Appeal No. W-02-385-2009 subsequently referred to as "AmTrustee") acts as trustee for the noteholders in relation to the notes, pursuant to a trust deed dated 14 October 2004 as amended by Supplemental Trust Deed dated 17 October 2005.

[5] In 2007, the issuer defaulted in payments under the notes which led to AmTrustee and the noteholders considering legal action to be taken. PEDC Berhad (the 1st appellant in all three appeals), the holding company of the Issuer, requested indulgence in respect of the Issuer's default. In consideration thereof, the 1st appellant agreed to pay to AmTrustee RM30 million from the 1st appellant's rights issue exercise.

[6] On 1 August 2007 the 1st appellant issued a Letter of Undertaking to AmTrustee where they irrevocably and unconditionally agreed that a sum of RM30 million from the proceeds received from its rights issue exercise will be paid to AmTrustee towards monies owing by the issuer under the notes and that such payment will be made not later than seven days after the date of receipt by the 1st appellant of the proceeds of the rights issue. The 1st appellant also agreed to indemnify the noteholders/AmTrustee, against all loses and claim.

[7] The Securities Commission, pursuant to the powers conferred upon them by the applicable law then, ie, s. 32 of the Securities Commission Act 1993, *vide* letter dated 26 September 2007, approved the 1st appellant's rights issue exercise conditional upon the terms set out in the Annexure which includes the utilization of the rights issue monies, of which RM30 million was to part-settle the MUNIF/MMTN and other borrowings that are

already due and payable, as well as to comply with the relevant requirement of the Securities Commission's Policies and Guidelines on Issue/Offer of Securities pertaining to the rights issue exercise.

[8] On 18 September 2007 and 5 October 2007, the 1st appellant issued a Circular to its shareholders on the rights issue and Addendum to Circular. In both these documents, it was expressly stated that, from the proceeds of the rights issue, RM30 million will be for partial redemption of the MUNIF/ MMTN Notes.

[9] On 10 October 2007 the 1st appellant's shareholders approved the rights issue exercise and subscribed to the rights issue shares. The rights issue was successfully completed, granted listing status, and quoted on Bursa Malaysia Securities Berhad on 30 November 2007.

[10] After receiving the rights issue proceeds, *vide* letter dated 11 January 2008, the 1st appellant informed AmTrustee that the subject matter of their undertaking, (ie, the sum of RM30 million), would not be paid to AmTrustee but would instead be utilised under a scheme which involved cash payment of RM40 million to Scheme creditors. In other words, instead of using RM30 million out of the RM40 million to settle the MUNIF/MMTN Noteholders, the 1st appellant now intends to apply the whole RM40 million to the Scheme. This letter is reproduced for ease of reference. It states as follows:

Our ref: G-FIN/AmT/RM/009-08

11 January 2D06

AmTrustee Berhad
17th Floor, Bangunan AmBank Group
55, Jalan Raja Chulan
50200 Kuala Lumpur

Attn: YM Raja Amir Shah
Chief Executive Officer

Puan Nurizan Jalil
Manager

Dear Sirs,

Peremba Jaya Holdings Sdn Bhd
RM200 Million Murabahah Underwritten Notes Issuance Facility1murabahah Medium Term Notes ("MUNIF/MMTN")

As you know, PECD Bhd is currently developing a restructuring plan for all its creditors. We hope to present a preliminary plan for the creditors' consideration in February 2008. As discussed in our meeting, the formulation of a restructuring plan for Peremba Jaya Holdings Sdn Bhd ("PJHSB") depends on the outcome of PJHSB's claims negotiations with Putrajaya Holdings Sdn Berhad ("Putrajaya Holding"). We attached herewith a letter from Putrajaya Holdings for your information indicating the proposed timeline to resolve the matter.

We would also like to note that management has deliberated at length on your proposal of transferring RM30million of the rights issue proceeds to the MUNIF/MMTN noteholders' sinking fund. Unfortunately, management is unable to proceed with your proposal while the overall group restructuring is currently-being formulated and would appeal to the noteholders to give PJHSB more time to resolve the matter.

We appreciate your understanding and we are very thankful for the patience and kind considerations which the MUNIF/MMTN noteholders have given us thus far. We will certainly hope that as the resolution on Perembajaya Holdings' Precinct 11 claims is imminent, you would be able to accommodate our request to discuss a plan on how to resolve the debt by February 2008.

We thank you again for your patience and kind consideration.

Thank you.

Yours faithfully,
For Peremba Jaya Holdings Sdn Bhd

Sgd

ROSMAN ABDULLAH
Group Chief Executive Officer.

[11] The 1st appellant then, *vide* letter dated 22 August 2008 to the Securities Commission, applied for approval to allow the rights-issue proceeds which was initially earmarked for the partial repayment of MUNIF/MMTN amounting to RM30 million, and the repayment to the Oceana Lenders amounting to RM10 million, resulting in an aggregate of RM40 million ("Earmarked Proceeds"),

to be varied. The rationale for the proposed scheme was, in view of the appellant's financial circumstances, the board has a duty to the general body of creditors as to the utilisation of its assets. Any payment to a specific creditor or body of creditors in preference to other creditors would amount to payments which may give rise to legal consequences. The board's proposal was that all creditors of PECD should be treated fairly, justly and equally *via* the Proposed Scheme. At that juncture, the 1st appellant would not be in a position to effect the utilization of the Earmarked Proceeds as approved for the partial redemption of the MUNIF/MMTN Noteholders and/or the Oceana Lenders.

[12] AmTrustee's reaction to the non-payment for the part redemption of the MUNIF/MMTN Noteholders was to issue a letter of protest dated 5 May 2008 to the Securities Commission against the 1st appellant's refusal to do so. AmTrustee then through their solicitors issued a letter of demand dated 8 May 2008 to the 1st appellant in the following terms:

> PECD Berhad
> 5th Floor, Block E
> Peremba Square, Section U2
> 40150 Shah Alam
> Selangor Darul Ehsan
>
> Attn: Encik Rosman Abdullah
> Group Chief Executive Director
>
> Dear Sirs,
>
> Re: Issuer : Peremba Jaya Holdings Sdn. Bhd
>
> Facilities : RM200.0 million Murabahah Underwritten Notes Issuance Facility/Murabahah Medium Term Notes ("MUNIF/MMTNs Facility")
>
> We act for AmTrustee Berhad as the Trustee for the Noteholders of the Notes issued by Peremba Jaya Holdings Sdn. Bhd. ("the Issuer") under the abovecaptioned MUNIF/MMTNs Facility. We also act for the said Noteholders.
>
> 2. We refer to your letter of undertaking dated August 1, 2007 ("the Undertaking") issued to our clients, AmTrustee Berhad, whereby you have irrevocably and unconditionally agreed, undertaken and guaranteed to our clients' that a sum of RM30.0 million from the proceeds raised from the renounceable rights issue of new ordinary shares of RM0.50 each ("Rights Shares") in your company together with warrants ("Rights Issue with

Warrants") – will be paid to our clients towards payment of moneys owing by the Issuer to the Noteholders under the MUNIF/MMTNs Facility or any part thereof and that such payment will be made not later than seven (7) days after the date of receipt by you of such proceeds from the Rights Issue with Warrants. You had also agreed pursuant to the Undertaking to indemnify the Noteholders and our clients against *inter alia* all losses, claims, damages, costs, charges and expenses whatsoever, arising out of or in connection with any failure on your part and/or the part of the Issuer to perform any of your/its respective obligations as per the terms of the Undertaking.

3. The Rights Issue with Warrants has since been implemented with the Rights Shares having been granted listing and quotation on Bursa Malaysia Securities Berhad on November 30, 2007.

4. Notwithstanding the terms of the Undertaking and your receipt of the proceeds from the Rights Issue with Warrants, you have yet to pay the sum of RM30.0 million to our clients despite their and the Noteholders' numerous requests and reminders. This is clearly a breach of your obligations to our clients under the Undertaking. In this respect, our clients would like your URGENT written clarification as to the present status of the said RM30 million and whether the said sum is still being held by you.

5. Further, upon our clients' instructions and on their behalf, we hereby demand that payment of the said sum of RM30.0 million be paid by you to our clients within seven days from the date of this letter failing which our clients shall be compelled to commence legal proceedings against you for the recovery of the said sum forthwith without further reference to you. In all-events, all costs and expenses incurred by our clients shall be borne by you.

6. Please note that the demand herein is made without prejudice to the rights of any of our clients' rights and remedies against the Issuer in respect of recovery of sums due under the MUNIF/MMTNs Facility and under the security documents for the MUNIF/MMTNs Facility and our clients hereby reserve the right to exercise the same.

Yours faithfully,

Sgd. Shook Lin & Bok

c.c. AmTrustee Berhad
17th Floor, Bangunan AmBank Group
55 Jalan Raja Chulan
50200 Kuala Lumpur

Kuala Lumpur High Court Originating Summons No: D1-24-63-2008

[13] On 5 March 2008, *vide* Ex parte Kuala Lumpur High Court Originating Summons No: D1-24-63-2008 ("the 1st OS"), the appellants applied for leave to convene a creditors' meeting under s. 176 of the Companies Act 1965 ("the Act") to consider a Scheme of Arrangement and for a Restraining Order of 90 days. The appellants application *vide* the 1st OS was dismissed by the High Court on 24 April 2008. The appellants appealed to the Court of Appeal against the dismissal of the 1st OS.

[14] On 9 May 2008 the Court of Appeal allowed the appellants' appeal against the decision of the High Court dated 24 April 2008 in respect of the 1st OS, but however granted a restraining order only for a period 60 days expiring on 9 July 2008 ("the 1st RO").

[15] On 3 July 2008 the appellants' applied under the 1st OS for an extension of the 1st RO for another 30 days from 9 July 2008 which application was dismissed by the High Court on 14 July 2008. The appellants' appeal against this order of the High Court dated 14 July 2008 was dismissed by the Court of Appeal in July 2008.

[16] On 1 August 2008 the appellants' Scheme of Arrangement was rejected at a creditors' meeting.

Kuala Lumpur High Court Originating Summons No: D2-24-336-2008

[17] The appellants then, on 13 August 2008, *vide* Ex parte Kuala Lumpur High Court Originating Summons No: D2-24-336-2008 ("the 2nd OS") pursuant to s. 176 of the Act, once again applied for leave to convene meetings of certain creditors of the appellant ("the scheme creditors") to consider a Scheme of Arrangement dated 22 October 2008 ("the scheme") and for a restraining order of 90 days, which scheme is virtually the same as the subject matter of the 1st OS.

[18] On 18 August 2008 the appellants obtained an *ex parte* order in terms of the application under the 2nd OS. Notices were sent out to the creditors of the scheme to convene the scheme on 14 November 2008 pursuant to the *ex parte* order dated 18 August 2008.

[19] Merino-ODD Sdn Bhd, (the respondent in W-02(IM)-387-2009, "Merino") on 10 September 2008, Affin Bank Berhad (the respondent in W-02(IM)-386-2009, "Affin") on 31 October 2008 whilst AmTrustee (the respondent in W-02(IM)-385-2009) on 7 November 2008, filed their respective application to intervene in the 2nd OS. Merino and Affin applied to set aside the RO obtained in the 2nd OS and that they be excluded from the scheme. Affin sought for a further order that a sum of RM7.5 million be paid in an estrow account and be frozen. AmTrustee applied to set aside the *ex parte* order dated 18 August 2008. On 10 November 2008, all of the respondents were given leave by the court to intervene in the proceedings under the 2nd OS.

[20] The scheduled meeting of the creditors was called off by order of the court pending disposal of the respondents' applications to intervene. On 27 February 2009, the court allowed the respondents application and set aside the *ex parte order* dated 18 August 2008. Hence these three appeals.

[21] Section 176(1) of the Act provides that where a compromise or arrangement is proposed between a company and its creditors or any class of them or between the company and its members or any class of them, the court may on the application in a summary way of the company or of any creditor of the company, or in the case of a company being wound up of the liquidator, order a meeting of the creditors or class of creditors or of the members of the company or class of members to be summoned in such a manner as the court directs.

[22] Section 176(10) of the Act further provides that where no order has been made or resolution passed for the winding up of a company and any such compromise or arrangement has been proposed between the company and its creditors or any class of those creditors, the court may, in addition to any of its powers, on an application in a summary way of the company or of any member or creditor of the company restrain further proceedings in any action or proceeding against the company except by leave of the court and subject to such terms as the court imposes.

The Proposed Scheme

[23] According to the Scheme the 1st appellant will be using the RM30 million intended for the noteholders, to be paid to all creditors. Payment of a small percentage to settle each debt is

proposed to be effected by cash, preference shares and ordinary shares in the 1st appellant. The creditors who are to vote on the scheme are placed in three categories:

(a)	Scheme A – secured creditors of PCSB (2nd Appellant)	RM2,980,630
(b)	Scheme B – unsecured creditors of PCSB (2nd Appellant)	RM32,019,370
(c)	Scheme C – unsecured creditors of PECD (1st Appellant)	(RM9,938,000 derived from Scheme B)
	There is also a category of Non-Scheme Creditors, outside the Scheme	RM5,000,000
	Total:	RM40,000,000

[24] The issues raised in argument in these appeals will now be dealt within turn.

Whether The Appellant Had Failed To Disclose Material Facts?

[25] All of the respondents contended that the appellants, in moving the 2nd OS, has not disclosed material facts. The learned High Court Judge ruled that what transpired in the 1st OS, and the decision of the Court of Appeal in respect of the appeal therefrom, were material facts which should have been disclosed in their application for the *ex parte* order in the 2nd OS.

[26] The appellants took the position that there was no material non disclosure in obtaining the *ex parte* order dated 18 August 2008 in the 2nd OS. The non-disclosure of their failure to obtain a further extension of the 1st RO from the High Court and the Court of Appeal in respect of the 1st OS was not material as the failure was due to non compliance of s. 176(10A)(c) and (d) of the Act upon the objection by a particular creditor when the extension was sought. In the 2nd OS, these provisions of s. 176(10A) of the Act had duly been complied with.

[27] I am in agreement with decision of the learned judge on this issue. What transpired in the 1st OS at the High Court, and the decision of the Court of Appeal in respect of the appeal therefrom, were certainly material facts which should have been disclosed by the appellants in applying for the *ex parte* order in the

2nd OS. The 1st appellant should also have disclosed the fact that RM30 million of the RM40 million scheme monies came from the proceeds from the rights Issue raised for the specific purpose for payment to AmTrustee for partial redemption of the notes, and that AmTrustee had claimed such monies. The appellants should have also held out their letter seeking Securities Commission's approval for the rights issue exercise and Securities Commission's approval for the rights issue exercise and its terms. The failure to make such full and frank disclosure renders the *ex parte* order obtained liable, and rightly, set aside. (See *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2004] 1 CLJ 239; *Castle Inn Sdn Bhd v. Bumiputra-Commerce Bhd Bank* [2009] 2 CLJ 445.)

[28] On this ground alone these appeals can and are dismissed. Notwithstanding this, the other issues raised are of some importance which must also be addressed.

Whether RM30 Million Of The Rights Issue Proceeds By The 1st Appellant Are Trust Monies

[29] AmTrustee's contention that there was a trust over the RM30 million of the rights issue proceeds because of the undertaking by the 1st appellant, was accepted by the High Court based on the line of cases of which *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 is the highest authority. The High Court Judge ruled that the RM30 million proceeds received by the 1st appellant from the rights issue exercise were expressly for the purpose of paying AmTrustee and held on trust by the 1st appellant in favour of AmTrustee as the sole or exclusive beneficiary of the same in the nature of a Quistclose Trust.

[30] The appellants' counsel argued that this case did not involve the law of trust, but that of contract. He submitted that to constitute a trust there must be a settlor (absolute owner) extant property or at least a proprietary right to future property, a trustee (in whom legal title over the property is vested) and a beneficiary at the time of the settlor's purport to create a trust. He argued that on the date of the undertaking (1 August 2007), the 1st appellant only had an expectancy to future property in the total sum to be raised from the proposed increase in the share capital through the rights issue. Such an expectancy, according to the appellants' counsel, was insufficient to create a trust. In the absence of a settlor, there was no trustee in whom legal title of

the subject matter of trust could be vested. In the absence of a trustee, there was no beneficiary. He submitted that in holding that there was a trust over the fund, and in finding AmTrustee as the absolute owner of the earmarked monies, the High Court Judge had elevated the status of noteholders from that of an ordinary creditor pursuant to the undertaking to more than a secured creditor.

[31] According to the appellant's counsel AmTrustee was not a beneficiary, and has no *locus standi* to sue. In a Quistclose Trust the money results back to the payor. In a share purchase/subscription factual matrix situation, there is generally no retention of beneficial interest or control by the purchaser/subscriber over the money paid as purchase for the shares. It is an ordinary commercial transaction between the purchaser/subscriber and the company and the purpose of a purchase/subscription is investment. Once shares have been allotted to a purchase/subscription, the money is at the free disposal of the company, the purpose having been achieved.

[32] Ms Yoong, counsel for AmTrustee, took issue. This was not a private transaction but one made known to the world at large *via* the circular and announcements to the public shareholders inviting subscription for the rights shares.

[33] The 1st appellant's letter of undertaking clearly demonstrates an unequivocal intention that the RM30 million proceeds to be received from the rights issue exercise would be applied by them for part settlement for the sum due on the notes. When the 1st appellant applied to the Securities Commission for approval of the rights issue exercise, it had also specifically stated that RM30 million of the rights issue was for the express purpose of settling part of the notes. The public was also similarly notified as evident from the circular to shareholders dated 18 July 2007 for approval (para 2.5 and also reflected in the addendum to circular dated 5 October 2007, Abridged Prospectus dated 30 October 2007 to the public for subscription of the rights issue shares (para 4.2). The Securities Commission conditions or approval was confirmed in the Prospectus issued by the 1st appellant.

[34] Ms Yoong submitted that in these circumstances the RM30 million never formed part of the assets of the 1st appellant. If the money is used by the 1st appellant for its scheme to pay other creditors, this would amount to a breach of trust. The fact that

A the subscribers (or source of the rights issue proceeds) did not retain any equitable or beneficial interest in the RM30 million does not detract from the fact that the 1st appellant received the money for the specific purpose of part settlement of the sum due on the notes and is therefore duty bound to apply it for that
B purpose.

[35] The judge was accordingly right in ruling that RM30 million out of the RM40 million which the 1st appellant proposed to distribute to the scheme creditors, is held on a Quistclose trust by
C the 1st appellant in favour of AmTrustee as absolute beneficiary pursuant to the letter of undertaking dated 1 August 2007. AmTrustee was entitled in law to enforce the primary trust for the RM30 million against the appellants.

D **[36]** My decision on this issue is this. In *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567 at 580 the House of Lords held that an arrangement between a payor and a payee pursuant to which the payor parts with the money to the payee with common intention that the money when received by the
E payee will only be applied for a specific purpose and no other purpose. In *Quistclose*, the money that was lent to the company and paid into a segregated account of the company with the bank was lent to be utilized by the company for a particular purpose, pay declared dividends to shareholders. When the purpose could
F not be fulfilled because of the company's intervening insolvency, the money resulted back to the lender under a resulting trust. As such, the bank could not utilize the money in the segregated account as if it was the money of the company for the purpose of setting off sums owed by the company to the bank.

G **[37]** After careful consideration of the authorities on this issue I am of the considered opinion that it is not appropriate to analyse the *Quistclose* type of case in terms of the constituent parts of a conventional settlement as submitted by the appellants' counsel. It is of course true that there are factual differences in the *Quistclose*
H case, and the facts of the present case. The transaction in *Quistclose* was one of loan with no contractual obligation on the part of the lender to make payment prior to the agreement to the loan. In the present case, there is no loan but there is an antecedent debt owed by the Issuer, as well as an undertaking by
I the 1st appellant, to pay to AmTrustee part of the sums owing to the noteholders from monies raised from the rights issue exercise.

[38] In my judgment the principle in the *Quistclose* line of cases is that equity fastens on the conscience of the person who receives monies for a specific purpose, and not for the recipient's own purposes, so that such a person will not be permitted to treat the property as his own or to use it for other than for the stated purpose. I am of the view that the High Court Judge was right in finding that a contractual promise to apply earmarked monies for a specific purpose create an equitable trust in those monies by way of trust based on the proposition that it is unconscionable for a man to give an undertaking and obtain money on terms as to its application and then to totally disregard the terms on which the monies were to be applied. The High Court Judge was therefore right in finding that the sum of RM30 million out of the rights issue was held by the 1st appellant on a *Quistclose* trust.

[39] This scheme, similar to that of the 1st which is the subject matter of the 1st OS, was voted out by creditors. The appellants have no funds other than the rights issue monies. It is against public policy to approve a scheme by an insolvent company (See *Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106).

The Capital Markets And Services Act 2007

[40] The issue raised by the appellant was that the High Court Judge was wrong in applying Capital Markets and Services Act 2007 (CMSA) to this case.

[41] The High Court Judge's held:

> The RM30 million was raised from the shareholders of a public listed company pursuant to legislation, namely the Capital Markets and Services Act 2007 (CMSA)
>
> ...
>
> In my view, there is merit in the arguments of learned counsel for the 3rd Intervener that if the 1st Applicant were to utilize the RM30 million contrary to the object for which the same was raised, the 1st Applicant would have misled and misrepresented the intention of its funds raising exercise to its shareholders, the public and the SC concerning the rights issue exercise. When looked in this way, one can see that any utilization of RM30 million contrary to the purpose for which the same was raised would contravene the provisions of the CMSA, which might attract penal sanction. It is an offence under the CMSA if the terms and

A conditions of the SC for rights issue are not met. It is also an offence if false or misleading statements are made to the SC. In addition, the CMSA also provides that it is an offence if abridged prospectus for rights issue contains misleading information. No judgment of this court will be intended to aid any contravention of law. This court will not compromise on shareholder protection and market integrity. This is required and vital in order to instill confidence among investors of the integrity of our capital market and the economic sector of our country.

[42] I am of the view that nothing turns on this point for the following reasons. The CMSA came into force two days after the Securities Commission approved the 1st appellant's application for rights issue exercise (26 September 2007). The rights Issue exercise was implemented after the CMSA came into force on 28 September 2007. The relevant provisions of CMSA and its predecessor, the SIA, governing the issues of securities by a public listed company, are identical. The 1st appellant in any event was estopped from arguing it can use the monies as it wishes as the 1st appellant had attempted but failed to secure the Securities Commission's permission for a change in the utilization of the RM30 million.

[43] The appellants clearly have failed to act *bona fide* in the 2nd OS proceedings and had abused the provisions of s. 176 of the Act and the court process. By obtaining the 2nd RO on an *ex parte* basis, the appellants had restrained AmTrustee from pursuing its rights under the 1st appellant's undertaking. If the appellants had then proceeded to the creditors' meeting to vote on this scheme, there was a possibility the other creditors may out-vote AmTrustee, as they will be paid from the monies solely due to AmTrustee.

[44] For these reasons the appeals are dismissed with costs. The deposit to the respective respondent to account of taxed costs.

Kang Hwee Gee J:

[45] This was an appeal by the appellants against the decision of the High Court in allowing the application of the interveners to set aside the *ex parte* order which the appellants obtained earlier under s. 176 of the Companies Act 1965.

[46] The 1st appellant PECD was the holding company of the 2nd appellant its wholly-owned subsidiary.

The Background

[47] On 14 October 2004 a wholly owned subsidiary of the 1st appellant, PECD Jaya Holdings Sdn Bhd had executed a Murabahah Notes Issuance Facility Agreement with some 14 investors to issue certain Islamic notes up to the value of RM200 million. The 3rd respondent (Suit No. W-02(IM)-385-2009) was their trustee to manage their investment in the Murabahah Notes and to whom all repayments of the notes were to be paid to.

[48] By 2007 however PECD Jaya Holdings Sdn Bhd had defaulted on the repayment of the notes. The 1st appellant as the holding company had to step in to obtain indulgence from the 3rd respondent in consideration of which it undertook to pay the 3rd respondent the sum of RM30 million in part payment. The money was to be raised by a rights issue of about RM172,500,000 of the 1st appellant's new shares and RM81,045,600 of its warrants of which the sum of RM30 million would be used to pay to the 3rd respondent. A letter of undertaking to this effect was accordingly issued to the 3rd respondent.

[49] In December 2007 after successfully completing the rights issue exercise, both the appellants found themselves in dire financial straits. The 1st appellant had to renege on its undertaking to pay the 3rd respondent the sum of RM30 million on the ground that it was insolvent.

[50] On 5 March 2008 the 1st and the 2nd appellants made a joint *ex parte* application for:

(a) an order pursuant to s. 176(1) of the Companies Act 1965 to convene meetings of the schemed creditors of the appellants within 90 days from the date of the order; and

(b) an injunction pursuant to s. 176(10) of the Companies Act 1965 restraining all legal proceedings against the appellants for a period of 90 days from the date of the order.

[51] The *ex parte* application was disallowed by the High Court. However on appeal, the Court of Appeal granted the application in terms save that the restraining order was granted only for 60 days.

[52] On 14 July 2008 the appellants applied for an extension of the restraining order for another 30 days but this was rejected by the High Court and also by the Court of Appeal on appeal.

[53] On 13 August 2008 the appellants again applied *ex parte* for the same orders notwithstanding that the application of 5 March 2008 had expired and its extension had been disallowed by the High Court and the Court of Appeal.

[54] The application of 13 August 2008 was heard by a different judge of the same court who granted the *ex parte* order.

[55] The 1st, 2nd and 3rd respondents who were creditors of the appellants intervened to set aside the *ex parte* order.

[56] The three applications were heard together at the end of which the High Court set aside the *ex parte* order obtained by the appellants on 13 August 2008. Hence the present appeal.

The Proposed Scheme Of Arrangement

[57] The Scheme of Arrangement sought to settle the appellants' combined debt of about RM1,302,514,659 and would involve a corporate restructure of the appellants by reduction of capital and consolidation of their shares. The mechanics of the Scheme of Arrangement was set out in detail in the supporting affidavit of the 1st appellant's Chief Executive Officer, Rosman bin Abdullah.

[58] Under the scheme creditors would be required to waive 70.04% of their debt and all overdue interests or penalty charges, and to forgive all corporate guarantees given by the 1st appellant in respect of the indebtedness of the 2nd appellant.

[59] A sum of RM44,938,000 would be mobilized to pay the creditors who would receive 3.45% in cash; 4.63% by the issuance of new ordinary shares of the 1st appellant at the conversion rate of two new ordinary shares at the par value of RM0.50 for every RM1 debt outstanding; and 21.89% by the issuance of redeemable cummulative convertible preference shares ("RCCPS") of the 1st appellant with a nominal value of RM1.

[60] Proceeds from the claims of the 2nd appellant's overseas project (which would be saved in an account to be opened) would be used for the redemption of the RCCPS where necessary and required.

The Grounds For Allowing The Ex-parte Order To Be Set Aside

[61] The application to set aside was allowed by the High Court on two broad grounds.

[62] First, His Lordship found that there was a non disclosure of material fact in that the appellants had failed to disclose that they had previously made a similar application which had been dismissed by the High Court.

[63] Second, His Lordship found the proposed Scheme of Arrangement lacking *bona fide* and unworkable. His Lordship found as a fact that there was no "fresh injection of capital or the entry of a so called 'white knight' to facilitate the survival of the applicants." The sum of about RM40 million which the appellants intended to inject into the scheme had come almost entirely from the proceed of the rights issue and out of this, RM30 million was under the terms of the rights issue to be used to partially pay the 3rd respondent for the benefit of the Murabahah Note holders. The court went so far as to find that this sum had belonged to the note holders under a Quistclose trust. His Lordship found the appellants hopelessly insolvent that public policy would not allow such a scheme should be sanctioned.

The Appeal

[64] The three appeals were filed individually by the 1st, 2nd and 3rd respondents. As the grounds of appeal are essentially similar, the appeals were heard together. At the hearing of the appeal only counsel for the 3rd respondent submitted as counsel for the other respondents chose to adopt her submission.

[65] A number of grounds were canvassed in the appeal. Having heard the submission of the parties we were unanimous that the appeal be disallowed on the same grounds as found by the High Court. We intimated that we would provide our reasons later which we now do.

Material Non Disclosure

[66] On my part, it is clear to me that the appellants had omitted to state in their supporting affidavits the fact that a previous application under s. 176 of the same nature based on the same facts, grounds and report had been made to the same court

before the previous judge and had been dismissed; that the order was only allowed on appeal to the Court of Appeal which granted a restraining order of 60 days; that subsequently an application for extension of the restraining order was disallowed by the High Court and this was confirmed on appeal to the Court of Appeal; and that the proposed Scheme of Arrangement under the order had earlier been rejected by the creditors at the meeting on 1 August 2008.

[67] The requirement that an affidavit supporting an *ex parte* application for a relief must make a full and frank disclosure in order to enable the court to properly decide whether there are grounds to grant the order on an *ex parte* basis is so well established. The passage from the judgment of Warrington CJ in *Reg v. Special Commissioners of Income Tax District of Kensingon, ex parte Princess Edmond De Polignac* [1917] 1 KB 486 at 509, cited by the learned judge correctly states the law.

[69] An application made:

> in the absence of the person who will be affected by that which the court is asked to do, is under an obligation to the court the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may already obtained by reason of the order which has thus been obtained by him.

[69] The appellants' contention that there may not be a need to disclose the aforementioned facts as the appellants were making a fresh application is unacceptable. On the contrary the fact that it was a new application based on the same Scheme of Arrangement makes it all the more necessary that all facts relating to the previous application be disclosed for whatever reason it may have been dismissed. Without disclosing the antecedent of the new application the judge would not be able to undertake an objective assessment whether to grant the order sought on an *ex parte* basis. I would go so far as to say that the appellants' omission to provide the necessary antecedents of the application in this case is an abuse of the process of the court which may necessitate citing the 1st appellant's Chief Executive Officer who deposed the affidavit supporting the application for contempt.

Non Bona Fide Of The Scheme

[70] It is common ground that out of the RM40 million that the appellants proposed to use in the Scheme of Arrangement with the creditors, RM30 million constituted sums from the rights issue which was raised by the 1st appellant specifically for the purpose of repaying the Murabahah Note holders as approved by the Securities Commission and as declared in the Abridged Prospectus disseminated to its shareholders.

[71] His Lordship was therefore right to find that it would be against public policy to sanction the Scheme of Arrangement for to do so would tantamount to condoning as against the 3rd respondent, a breach of undertaking, and as against the subscribers who expect the proceeds would be used to pay the Note holders, a probable breach of trust and a breach of s. 32 of Securities Commission Act 1993 (then in force) respecting the non compliance of the terms of the rights issue as approved by the Securities Commission. I would therefore agree entirely with him that there was really nothing in the scheme that the appellants intended to propose to the creditors.

[72] Be that as it may, I am unable to agree with his finding that the RM30 million belonged to the 3rd respondent as beneficiary of a Quistclose trust as submitted by its counsel Miss Yoong.

[73] A Quistclose trust is derived from the House of Lords' case of *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567. Basically, a Quistclose trust exists when a debtor undertakes to use the loan he obtains from a lender for a purpose (in the case of Quistclose, for the payment of dividend). The loan obtained is then kept apart in a trust account from the borrower's other assets. In the event that the purpose of the loan cannot be achieved by reason of the debtor's insolvency, the sum in the trust account is to be returned to the lender and not to be distributed among his other creditors.

[74] In the Quistclose case a company called Rolls Razor had to borrow funds from Quistclose to pay dividend which it had declared to its shareholders. It was a term of the loan agreement between Quistclose and Rolls Razor that the money would be used specifically for payment of the dividend and was to be paid to a trust account at Barclays Bank. Rolls Razor went into liquidation before the dividend could be paid out. Barclays' claim

A to the money in the trust account as set off against debts owed by Rolls Razor to Barclays was rejected by the House of Lords basically on the rational (per Lord Wilberforce) that "when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose" and in that B case it was for the purpose of paying dividend to shareholders.

[75] It is true the sum was raised by the 1st appellant from subscribers of the rights issue and was intended to be used for the specific purpose of paying the note holders. But it is clear that C the note holders were not beneficiaries of the sum under a trust less so a Quistclose trust. Unlike in Quistclose the note holders were not the provider of the fund. The subscribers paid the money to buy the rights issue shares from the 1st appellant as opposed to paying the note holders the sum due from the 1st or D the 2nd appellant under the notes.

[76] The note holders' recourse is an action against PECD Jaya Holdings Sdn Bhd (the issuer of the notes) or against the 1st appellant (the holding company of PECD Jaya Holdings Sdn Bhd) to enforce its undertaking to repay the notes. The note holders E stand in the same position as any unsecured creditors in respect of the debt owed on the notes in the event that the 1st appellant is wound up before it settles the notes.

[77] The appeal is dismissed with costs.

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[78] My learned brother KN Segara, JCA has read this judgment and has concurred with the views expressed therein.

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